No. 90-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. GIBSON,
Petitioner,
v.
THE FLORIDA BAR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION AND SAN BERNARDINO TEACHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This brief *amici curiae* is submitted by the National Education Association (NEA), the California Teachers Association (CTA) and the San Bernardino Teachers Association (SBTA), with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF AMICI CURIAE

NEA is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of state and local affiliates. CTA is NEA's state

affiliate in California, and SBTA is NEA's local affiliate in the San Bernardino, California School District.

Many of NEA's local affiliates, including SBTA, are recognized as exclusive bargaining representatives, and are parties to collective bargaining agreements that contain agency fee provisions that are subject to the procedural requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). In *Grunwald v. San Bernardino City Unified School District*, 917 F.2d 1223 (9th Cir. 1990), *petition for rehearing and suggestion for rehearing en banc pending*, a panel of the Ninth Circuit held, over Judge Kozinski's strong dissent, that SBTA's agency fee collection procedure—a procedure used by many other NEA affiliates as well—does not satisfy *Hudson* in two respects.

First, the *Grunwald* court held that nonmembers who object to paying the full agency fee are entitled to an "advance reduction" of the fee, even where the entire amount paid by an objecting nonmember is immediately upon collection placed in an interest-bearing escrow account until the portion of the fee that represents activities that cannot constitutionally be charged to objectors has been determined. 917 F.2d at 1227-28 (majority opinion); *see also id.* at 1230-31 (Kozinski, J., dissenting).

Second, the *Grunwald* court held that it is unconstitutional for agency fee deduction to begin before notice of the right to object to the amount of the fee has been sent to nonmembers, even where the entire amount paid by all agency feepayers is placed in escrow in the meantime. *Id.* at 1228 (majority opinion); *see also id.* at 1231 (Kozinski, J., dissenting).

The present case involves issues of "advance reduction" and "pre-collection notice" that are akin to the issues presented in *Grunwald*, although here the issues involve the collection of state bar dues rather than union agency

fees.[1] Petitioner cites and relies upon *Grunwald* in support of his position on both of these issues. *See* Brief for Petitioner ("Pet. Br.") at 13-14 (advance reduction); *id.* at 21 (pre-collection notice).

Because of the similarity of the issues involved, the Ninth Circuit has issued an order deferring consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc that has been filed by SBTA in *Grunwald*, pending this Court's decision in this case. The Ninth Circuit has stated that "[t]he decision of the Supreme Court in *Gibson* will affect our consideration of the Petition . . . ." *Grunwald v. San Bernardino City Unified School District*, Nos. 88-6617, 88-6619 (9th Cir., March 29, 1991).

Accordingly, this Court's decision on the issues of advance reduction and pre-collection notice that are presented in the instant case will have a direct impact on the ultimate disposition of *Grunwald*, and on the agency fee collection procedures used by many other NEA affiliates. This brief is addressed to those two issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court held that to "protect[ ] the basic distinction between activities which all bargaining unit employees may be required to subsidize and those for which objecting nonmembers cannot constitutionally be charged, certain "[p]rocedural safeguards are necessary." *Id.* at 302. The Court stated that in fashioning such procedural safeguards, "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.*

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[1] In addition, there are certain important differences between the procedure used by the Florida Bar to collect dues and the procedure used by SBTA to collect agency fees. *See infra* at 16-17.

The Court in *Hudson* clearly did not intend to require procedures that would prove unduly burdensome. *See Keller v. State Bar*, 110 S.Ct. 2228, 2237 (1990) (emphasizing that unions can "operate[] successfully within the parameters of [the required] procedures") (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 767 P.2d 1020, 1046 (1989) (Kaufman, J., concurring and dissenting)). Nonetheless, in a series of post-*Hudson* cases, agency feepayers have attempted, sometimes successfully, to saddle unions with judicially imposed procedural requirements that are *not* necessary for "preventing compulsory subsidization of ideological activity," *Hudson*, 475 U.S. at 302, and that plainly "restrict[] the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *id. See, e.g., Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.) ("the plaintiffs and the National Right to Work Foundation [we]re merely trying to hamstring the union" by their demands in an agency fee case), *cert. denied*, 110 S.Ct. 278 (1989); *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1232 (9th Cir. 1991) (Kozinski, J., dissenting), (plaintiffs were "using [agency fee] litigation to pursue . . . political objectives by making life difficult for the union"), *petition for rehearing and suggestion for rehearing en banc pending*.

In this case, which arises in the context of compulsory bar dues,[2] petitioner seeks to compel the adoption of procedures which, in large part, would "hamstring the [Bar]," *Gilpin*, 875 F.2d at 1313, without providing significant additional protection to any cognizable constitutional interests. This is particularly true of petitioner's demands (1) that there be an "advance reduction" of

[2] This Court has held that the principles expressed in *Hudson* are relevant in determining the procedural protections required in the collection of bar dues. *See Keller*, 110 S.Ct. at 2237-38. The Court has not held, however, and nothing in this brief should be understood to suggest, that the requirements in the two contexts must be identical.

dues, rather than simply an escrow of disputed funds pending the resolution of any objections, Pet. Br. at 10-15, and (2) that notice of the Bar's expenditures and of the right to object thereto must be provided before any dues are collected, *id.* at 21-22.

We show in Part I that petitioner's demand for an "advance reduction" system should be rejected. Either an advance reduction *or* an interest-bearing escrow account fully protects the constitutional rights at stake, and there is no basis for petitioner's contention that *both* procedures must be provided.

In Part II we show that, at least where the fees collected from potential objectors are placed in escrow pending the submission and resolution of objections, the Constitution is not violated where notice of the right to object is sent after the collection process has begun.

Finally, we show in Part III that petitioner's appeal to the concept of "narrow tailoring" does not provide a justification for "advance reduction," "pre-collection notice" or other procedures that do not provide any significantly increased protection of constitutional rights but simply hamper the ability of a union or a state bar to collect funds to which the organization is lawfully entitled.

ARGUMENT

I. WHERE AN OBJECTOR'S FEES ARE PLACED IN ESCROW PENDING DETERMINATION OF THE ULTIMATE AMOUNT TO BE CHARGED, NO "ADVANCE REDUCTION" IS CONSTITUTIONALLY REQUIRED

A. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that a public sector union may constitutionally charge all bargaining unit employees for certain activities, but that there are certain other activities which objecting nonmembers may not constitutionally be required to subsidize.[3]

Subsequently, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court held that to "protect[] the basic distinction drawn in *Abood*" between activities for which objectors' compelled fees may be spent and activities for which such fees may *not* be spent, certain "[p]rocedural safeguards are necessary." *Id.* at 302. Specifically, the Court held that three procedural requirements are applicable to the collection of agency fees:

> We hold today that the constitutional requirements for the Union's collection of agency fees include [1] an adequate explanation of the basis for the fee, [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [3] an escrow for the amounts reasonably in dispute while such challenges are pending. [*Id.* at 310.]

Petitioner seeks to read a *fourth* requirement into *Hudson*: namely, that a union collecting agency fees, or a bar association collecting dues, must "provide an objector an advance reduction for the proportion of dues that it expects to use for political activity." Pet. Br. at 10. Al-

[3] This case does not present any issue as to how the line between chargeable and nonchargeable activities should be drawn in either the union or bar context. *See generally Lehnert* v. *Ferris Faculty Assn.*, No. 89-1217 (May 30, 1991).

though an "advance reduction" requirement might appear at first blush to be innocuous, there are in many instances compelling reasons why such a requirement would prevent a union or a state bar from collecting funds to which it is lawfully entitled. *See Grunwald*, 917 F.2d at 1232 & n.4 (Kozinski, J., dissenting). And, in all events, nothing in *Hudson* or in the applicable constitutional principles requires that there be an advance reduction.

B. In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court explained why, under the Railway Labor Act, a union is not permitted to use a pure rebate system, under which the union "exact[s] and us[es] full dues, then refund[s] months later the portion that it was not allowed to exact in the first place." *Id.* at 444. The Court stated that under such a system, "the union effectively charges the employees for activities that are outside the scope of the statutory authorization," and thus "obtains an involuntary loan for purposes to which the employee objects." *Id.* Having defined the respect in which a pure rebate system is deficient, the Court went on to identify two "acceptable alternatives," *id.*, "advance reduction of dues and/*or* interest-bearing escrow accounts," *id.* (emphasis added), either of which eliminates any danger of "an involuntary loan for purposes to which the employee objects."

There is nothing in the language or reasoning of *Hudson* to signal any departure from *Ellis*. Indeed, this aspect of *Ellis* is quoted with approval in *Hudson*. *See* 475 U.S. at 303-04. To be sure, the union in *Hudson had* an advance reduction system, *see* 475 U.S. at 295,[4] but

[4] The union in *Hudson* reduced the fee for *all* nonmembers to 95% of union dues, *id.*, apparently because the collective bargaining agreement and the state statute were thought to require such a reduction. We note that even if petitioner's argument here were accepted, an advance reduction would be *constitutionally* required only for "*objector*[*s*]," *see* Pet. Br. at 10, 12, 15; and a *nonmember* does not become an *objector* until he "make[s] his objection known." *Hudson*, 475 U.S. at 306 n.16.

that feature of the union's procedure was mentioned in this Court's decision simply because it was in connection with making the advance reduction that the union *informed feepayers of the proportion of expenditures that it had determined to be chargeable. Id.* The Court concluded that the explanation provided by the union was inadequate, because it did not provide information sufficient to enable a nonmember to make an informed decision whether to object to the union's determination. *Id.* at 306-07. The Court's statement that "the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share," *id.* at 306, simply reflected this conclusion. The same is true of the other references to an advance reduction in *Hudson*, *see id.* at 309, notwithstanding petitioner's effort to wrench those references from their context, *see* Pet. Br. at 11. In each of those statements the Court was speaking to the requirement of *adequate notice*, not to any requirement of an *advance reduction* as such.

The fact that the opinion in *Hudson* contains an extended discussion of why an *adequate notice* is constitutionally required, *id.* at 306-07, but contains nary a word to suggest why an *advance reduction* would be required, strongly indicates that the Court was requiring only the former, not the latter.

C. The requirement of an advance reduction is, moreover, at odds with the principle on which *Hudson* is based—namely, that it is the *spending* of objectors' funds, and not their mere collection, that gives rise to constitutional concerns.

As the Court put it in *Hudson*, "[t]he objective must be to devise a way of preventing *compulsory subsidization of ideological activity* by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (emphasis added), quoting *Abood*, 431 U.S. at 237. *See also Hudson*, 475 U.S. at

301-02 (the right to be protected is the nonmembers' "constitutional right to 'prevent the Union *spending* a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative'") (emphasis added), *quoting Abood*, 431 U.S. at 234; *Hudson*, 475 U.S. at 305 ("the quality of [nonmembers'] interest in not being compelled to *subsidize the propagation* of political or ideological views that they oppose is clear") (emphasis added); *Machinists v. Street*, 367 U.S. 740, 771 (1961) (feepayer has no claim "from the enforcement of the union-shop agreement by the mere *collection* of funds" (emphasis added)).

The Third Circuit recognized this critical distinction in *Hohe v. Casey*, 868 F.2d 67, 72 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989), when it stated:

> The First Amendment interest protected by *Hudson's* requirements is the nonmembers' "interest in not being compelled to subsidize the propagation of political or ideological views that they oppose." . . . Since the Union has escrowed the entire amount of all fair share fees deducted . . ., this interest is protected.

And, Judge Kozinski also saw the matter clearly in his *Grunwald* dissent, 917 F.2d at 1231:

> [T]he [*Hudson*] Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" 475 U.S. at 305, 106 S.Ct. at 1075. Here, the union uses not a penny for nonrepresentational activities, as 100% of the agency fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.[5]

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[5] Judge Kozinski added:

> In fact, the union goes well beyond what the Supreme Court requires; under *Hudson*, the union need not give up control over the entire agency fee, only the portion that might rea-

D. Petitioner nevertheless maintains that preventing subsidization of ideological activity "was not the *sole* 'objective' of the procedures" that *Hudson* mandated. Pet. Br. at 11 (emphasis by petitioner).[6] But petitioner does not identify any other "objective" underlying the *Hudson* procedures that could justify the imposition of an advance reduction requirement.

1. Petitioner begins with the premise that "the agency shop *itself* impinges on the nonunion employees' First Amendment interests." Pet. Br. at 12 (emphasis by petitioner), quoting *Hudson*, 475 U.S. at 309. Petitioner states that this is true of "the collection of compulsory union fees even for constitutionally permissible purposes." Pet. Br. at 12. However that may be, the relevant question is whether any First Amendment impingement arising from "the agency shop itself" is increased if the amount of the agency fee payment is, say $40 per month rather than $32 per month, when all funds are placed in an interest-bearing escrow account and none is used for matters as to which an objector cannot lawfully be charged.[7]

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sonably be questioned by an objecting employee, 475 U.S. at 310, 106 S. Ct. at 1077. By putting the entire agency fee into escrow, the union eliminates any quibble about what amount might be deemed reasonably subject to question. [*Id.* at 1231 n.2.]

[6] Petitioner asserts that "[w]ere that true, *Hudson* . . . need not have announced 'constitutional requirements for the Union's *collection* of agency fees,' and would have prescribed only *post*-collection protections." *Id.* at 11-12, quoting 475 U.S. at 310 (emphasis by petitioner). That argument is without force. The additional protection required by *Hudson* to which petitioner is referring—"an adequate explanation of the basis for the fee," 475 U.S. at 310—is intended to enable individuals to file an informed objection, *see id.* at 306, which, like the other *Hudson* requirements, will enable objectors to prevent the expenditure of their funds on nonchargeable activities.

[7] The figures used in this example are from *Grunwald*—with the caveat that the $8 monthly "overcharge" is assessed for only a few months at the outset of the school year, and is then *more than offset* by an up-front adjustment for the entire year. *Grunwald*, 917

Petitioner's answer to that question—that whenever the government collects money from an individual "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained," Pet. Br. at 12, quoting *Elrod* v. *Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion)—is patently wrong. Judge Kozinski disposed of that contention as follows in *Grunwald*:

> The . . . first amendment harm plaintiffs suggest is that the $8 a month is not available to *them* for three (or seven) months, so they are unable to use the money to exercise *their* first amendment rights . . . . If this argument were accepted, every suit for money against a party acting under color of government authority would automatically became a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize. [917 F.2d at 1231 (dissenting opinion) (emphasis in original).]

Petitioner's argument that any excessive collection of money by the government gives rise to a First Amendment claim therefore "proves too much." *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 705-06 (1986).[8] If the mere deprivation of money, as distinguished from the use of the money to subsidize views to which an individual

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F.2d at 1225 (majority opinion); *id.* at 1230 and n.1 (Kozinski, J., dissenting). *See infra* n.11.

[8] *Arcara* involved a First Amendment challenge to a statute requiring closure of any premises being used as a site for solicitation of prostitution. The challenge was based on the fact that the building involved in the case was a bookstore. To the argument that "the effect of the statutory closure remedy impermissibly burdens [the respondent's] bookselling activities," *id.* at 705, the Court stated:

> [T]his argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suspect that such liability gives rise to a valid First Amendment claim. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976).

objects, could ever rise to the level of a First Amendment claim, this could only be where the loss of the money results in "substantial rather than merely theoretical restraints on the quality and diversity of political speech," *Buckley v. Valeo*, 424 U.S. 1, 19 (1976), *i.e.*, where the challenged governmental action has a "substantial deleterious effect" on the individual's ability to speak. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). As the figures here and in *Grunwald* make clear, no such case is presented by the lack of an advance reduction of a portion of bar dues or agency fees.[9]

2. Petitioner also suggests that an advance reduction is necessary to prevent an improper deprivation of *property*. Pet. Br. at 12. Judge Kozinski succinctly disposed of that contention in *Grunwald*:

> Any due process concern is satisfied by the fact that there is an accounting, the opportunity to have the matter resolved by an impartial arbitrator, and the payment of interest (or its equivalent . . .) to make up for any lost use of the funds. [917 F.2d at 1231 (dissenting opinion)].[10]

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[9] In referring to the impingement that arises from "the agency shop itself," petitioner may be suggesting that the mere act of sending money to an escrow account for possible eventual payment to a union (or, here, a state bar) constitutes a form of association with the union or state bar even if the money is never actually paid over to the organization for its use. Even if that dubious proposition were accepted, the fact remains that any element of association that may be inherent in the act of sending a payment to an escrow account remains the same whether the amount of the payment is $32 or $40. As in *Ellis*, where "[t]he [plaintiff's] objection [to contributing to the cost of social activities was] that these are *union* social hours," 466 U.S. at 456 (emphasis by the Court), setting the monthly amount of an agency fee payment at $40 a month rather than $32 a month *"does not increase* the infringement of . . . First Amendment rights already resulting from the compelled contribution . . . ," *id.* (emphasis added), unless the additional amount is *spent* on nonchargeable matters.

[10] Even assuming that a substantive due process issue might airse if a defendant had no rational basis for refusing to adopt an advance reduction system, that is not the situation here, *see* 906 F.2d at 631, nor is it the case in *Grunwald*. *See* 917 F.2d at 1232 and n.4 (Kozinski, J., dissenting). And, if petitioner is suggesting that an advance reduction is required as a matter of *procedural* due process, that suggestion is equally unavailing. The "private interest . . . affected," *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), by placing a few additional dollars into escrow instead of leaving it in the plaintiff's pocket while objections are resolved is minimal. On the other hand, "the fiscal and administrative burdens," *id.*, that an advance reduction system would entail would be considerable. *See Grunwald*, 917 F.2d at 1323 and n.4 (Kozinski, J., dissenting).

E. In sum, there is no constitutional basis for petitioner's demand for an advance reduction where an objector's fees are placed in escrow. As the Court recognized in *Ellis*, *either* system protects the constitutional right at stake here by ensuring that none of an objector's money is used, even temporarily, for activities he or she cannot constitutionally be required to support. "[T]he mere collection of funds," without any impermissible expenditure, gives petitioner no claim. *Machinists v. Street*, 367 U.S. at 771.[11]

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[11] *Grunwald* illustrates just how devoid of logic or constitutional principle the "advance reduction" concept can become. In that case the union's procedure requires a nonmember employee to pay into escrow for a few months at the outset of the school year an amount equal to monthly union dues; but then, after the process of notice and objection has been completed but before the school year has ended, objectors receive from the escrow account a "rebate" check in the amount of the "nonchargeable" portion of the *entire year's* dues. Under this system, not only does the 100% escrow ensure that none of an objector's money is ever *used* for nonchargeable activities, but, because the chargeable portion invariably exceeds the total amount collected prior to the rebate, the timing of the annual "rebate" is such that an objector does not pay *even into escrow* more than the chargeable portion of the year's fee. (Indeed, under SBTA's system "the objector makes a small profit" over what would be the case if a month-by-month advance reduction system were used. 917 F.2d at 1230 (Kozinski, J., dissenting).) Despite these undisputed facts, and despite the fact that *Hudson* clearly contemplates setting an agency fee on an annual basis, *see* 475 U.S. at 307 and n.18, the *Grunwald* majority held that *Hudson* requires

II. AT LEAST WHERE THE FEES OF ALL POTENTIAL OBJECTORS ARE PLACED INTO ESCROW UNTIL OBJECTIONS HAVE BEEN RECEIVED AND RESOLVED, THE NOTICE ADVISING INDIVIDUALS OF THEIR RIGHT TO OBJECT NEED NOT PRECEDE THE FIRST DEDUCTION OF FEES

Members of the Florida Bar are required to pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Whenever the Bar takes a position on a legislative issue during the ensuing fiscal year, members are given the opportunity to file an objection to the expenditure of their dues for that purpose. Once such an objection is filed, a portion of the objector's dues is placed in escrow pending resolution of the objection.

In *Grunwald* a somewhat different procedure is involved, reflecting the nature of academic employment. Each school year, agency fees are collected via monthly payroll deductions from September 30 to June 30, with each of the ten deductions amounting to one-tenth of the annual dues paid by SBTA members. Feepayers (*i.e.*, teachers who have not become members of SBTA) receive a notice no later than October 15 advising them of their right to receive a "rebate" of the portion of the fee that is attributable to matters for which objecting feepayers may not be charged. Feepayers have until November 15 to submit an objection to paying the full fee (*i.e.*, to demand a "rebate"). Prior to that date, *all* fees are placed in escrow immediately upon receipt, and are kept in escrow until the end of the period for filing objections. The full amount of the fees paid by those feepayers who file an objection is retained in escrow until the objection is resolved, and at that point an up-front "rebate" of the nonchargeable portion of the *entire year's* fee is paid

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a union to apply an advance reduction to each *monthly installment* of the agency fee.

to each objector. As discussed, this "rebate" is received by the objector before he or she has paid, even into escrow, the full chargeable amount for the year. *See supra* n. 11.

Petitioner advances three attacks on the notice procedures of the Florida Bar. First, petitioner challenges the sufficiency of the information provided in the Bar's notices. Pet. Br. at 16-18. No challenge to the sufficiency of SBTA's notice was asserted in *Grunwald*, and we therefore do not address this aspect of the present case, except to note in the margin that petitioner has misstated the teaching of *Hudson* on this subject.[12]

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[12] Petitioner erroneously describes the notice requirements set forth in *Hudson* in at least two regards. First, petitioner asserts that "[t]o satisfy *Hudson*, the notice must explain which expenditures the organization demanding the fee considers chargeable and why." Pet. Br. at 18. If by this assertion petitioner is suggesting that a union (or in this case, the Florida Bar) must explain in its notice the reasoning that was used in determining why a particular expenditure is considered to be chargeable, petitioner significantly misreads *Hudson*. The only "explanation" required by *Hudson* is an "identif[ication]" of the major categories of expenditures that the union views as chargeable or nonchargeable. 475 U.S. at 306-07.

Second, by stringing together quotations from separate parts of the *Hudson* opinion, petitioner suggests that an organization's identification of chargeable and nonchargeable expenditures must be "verified by an independent autor." Pet. Br. at 16-17. As the Courts of Appeals unanimously have concluded, however, the role of the independent auditor under *Hudson* is *not* to make the legal determination of whether particular expenditures are or are not legally chargeable, but rather to determine whether the expenditures were in fact made as reported by the union or the state bar. *See, e.g., Andrews* v. *Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Dashiell* v. *Montgomery County*, 925 F.2d 750, 755-56 (4th Cir. 1991); *Lehnert* v. *Ferris Faculty Ass'n*, 893 F.2d 111, 112 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2586 (1990); *Gwirtz* v. *Ohio Education Ass'n*, 887 F.2d 678, 680 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1810 (1990); *Ping* v. *National Education Association*, 870 F.2d 1369, 1374 (7th Cir. 1989). In short, this Court should not allow petitioner's arguments with respect to notice to impose unworkably burdensome requirements on

Second, petitioner challenges the Florida Bar's procedure of requiring a separate objection each time the Bar takes a legislative position to which a member objects. This, petitioner asserts, requires an objector to "disclose[], by negative implication, those causes [he] does support," Pet. Br. at 19, and places on the objector "the considerable burden of monitoring" the Bar's publication twice a month, *id.* at 20. The procedure in *Grunwald* does not require multiple, item-by-item objections; under that procedure, a nonmember need only file a single objection each membership year, and need only state in the most general terms that he or she objects to his or her money being used for any nonchargeable activities.[13]

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unions or state bars, whether they be in the form of unrealistic accounting requirements or notices that look more like legal briefs.

[13] The annual notice that is sent by SBTA, and by *amici* and their other affiliates, indicates the percentage of the agency fee that is chargeable to objecting feepayers based, as *Hudson* expressly permits, on expenditures actually made by the union during its preceding fiscal year. Unlike the case with the Florida Bar, the spending patterns of *amici* and their affiliates remain fairly constant from year to year, so that the percentage of the budget that was expended for chargeable activities during any one year is likely to reflect fairly closely the percentage expended for such activities during the following year. Moreover, given the wide range of nonchargeable activities typically engaged in by unions, and the frequency with which unions engage in such activities (*see, e.g., Lehnert* v. *Ferris Faculty Association, et al.*, No. 89-1217 (May 30, 1991)), the alternatives of monitoring and categorizing individual union expenditures on an ongoing basis as these expenditures are made would be at worst unworkable and at best unduly burdensome, both for the union *and* the objecting feepayers. Accordingly, "the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307, n.18.

In order to assure that the agency fee is as current as is reasonably possible, *amici* and their affiliates recalculate the chargeable portion of the fee each year, and, in turn, require that objections be filed annually when feepayers are informed of the new fee and are provided with the information necessary under *Hudson* to assess the propriety of that fee. Turnover in the workforce, recordkeeping limitations and other practical considerations counsel against

We therefore do not address the issue whether the Florida Bar may constitutionally require item-by-item objections.

Finally, petitioner complains that the Florida Bar does not provide notice of its expenditures or of the right to object until dues have already been collected *and partially spent*. Pet. Br. at 21. Because *Grunwald* involved a somewhat similar issue, with the Ninth Circuit holding, over Judge Kozinski's dissent, that "notice of . . . the agency fee must be given to all nonmembers *before* any fees may be collected from them." 917 F.2d at 1228 (emphasis by the court), *see id.* at 1231 (Kozinski, J., dissenting), we now address this issue.

It is important at the outset to note a basic difference between the procedure at issue in *Grunwald* and the procedure at issue here. Under the procedure in *Grunwald*, during the short period between the commencement of monthly fee deductions and the sending of the notice, *all* fees collected from *all* nonmembers—that is to say, from all "potential objectors," *see Hudson*, 475 U.S. at 306—are placed into an interest-bearing escrow account. As a result, no money collected from any potential objector is spent by the union before the individual has been given notice and an opportunity to object, and if he or she does object, until that objection has been resolved.

Accordingly, petitioner's criticism of the timing of the Florida Bar's notice does not apply to the SBTA procedure that is at issue in *Grunwald*. Petitioner's argument that in this case notice must "precede the collection of any compulsory fees" hinges on the fact that under the Bar's procedure, it is the notice and subsequent objection "*which triggers escrow*." Pet. Br. at 21 (emphasis added). Petitioner's complaint is that because of the tim-

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the carryover of objector status from year to year. And, experience teaches that it is not at all uncommon for an individual to object in some years but not in others, depending on his or her view of the union's activities at the time.

ing of the notice, the Bar's procedure does not provide for an escrow until dues have been *partially spent*:

> Under the Bar's procedure, notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. Thus, there is both a certainty that some portion of the dues will be spent on the process of adopting legislative positions, because notice is not even given until after that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. [Pet. Br. at 22 (emphasis deleted).] [14]

Because the procedure at issue in *Grunwald* does *not* allow any potential objector's money to be spent until objections have been filed and resolved, the timing of the notice in *Grunwald* would not raise any constitutional issue even if the timing of the notice in this case were found to be constitutionally unacceptable.[15]

Yet the Ninth Circuit held in *Grunwald* that it is unconstitutional for SBTA to send its notice after the first monthly payroll deduction has been made, even though

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[14] The heading of this portion of petitioner's argument likewise reflects that petitioner's objection to the timing of notice under Florida Bar's procedure is based entirely on the contention that "The Bar's Scheme Permits It to *Spend* Objectors' Dues for Constitutionally Impermissible Purposes." Pet. Br. at 21 (emphasis added).

[15] This is not to suggest that the Bar's procedure *should* be viewed as unacceptable. The Bar has explained why it would be impracticable for the Bar to give pre-collection notice. And, the Court of Appeals has addressed petitioner's concerns by requiring that the Bar, in making any necessary rebate to an objector, must pay interest calculated as of the date that payment of the objector's dues was *received*. *See* 906 F.2d at 632. As the Court of Appeals held, the payment of such interest is adequate "to protect against the danger that the objecting members' funds will be used . . . to finance the Bar's political activity. . . ." *Id.* To require more than this would be unjustified given the Bar's explanation as to why pre-collection notice is unworkable.

the parties stipulated that there are legitimate logistical reasons why SBTA does not send its notice before that point. *See* 917 F.2d at 1232 and n.4 (Kozinsky, J., dissenting) (quoting stipulation). The court's only explanation for that ruling was its pronouncement that "[a]dvance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim." *Id.* at 1228 (majority opinion). But the *Grunwald* majority could not point to any way in which the timing of SBTA's notice fails to provide the requisite protection, and in reality, such protection *is* provided.

The purpose of the *Hudson* notice is to enable individuals to file objections which will entitle them to prevent the spending of their money on nonchargeable activities and, if they wish, to challenge the amount of the fee before an impartial decisionmaker. *See* 475 U.S. at 306-07. In *Grunwald*, the deadline for filing objections was November 15, and the arbitration to determine the chargeable amount was conducted in January. A notice sent by mid-October thus provided ample time for potential objectors to protect their rights.

The *Grunwald* majority did not explain why this is not so, and we submit that Judge Kozinski's dissent on this point is unanswerable:

> Nothing would be gained by giving nonmembers the information before any deductions are made. The relevant event is not the commencement of the deductions but the deadline for requesting a refund or review by an impartial arbitrator. Notice, after all, must have a purpose. The purpose here is to allow nonmembers to make a meaningful decision in exercising their right to object. So long as the union provides adequate information well in advance of the time when nonmembers must raise their objections, the purpose of notice is amply served. *Id.* at 1231 (dissenting opinion).

As Judge Kozinski's analysis reflects, and as this Court has observed, "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17-19 (1978). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) (requiring notice prior to deprivation where a *hearing* is required prior to deprivation). In the contexts of agency fees and bar dues, it is clear that no hearing need be conducted before funds are collected. *See Hudson*, 475 U.S. at 310 (hearing must be held "reasonably prompt[ly]" after fees are collected, and a portion of the fees collected must be placed in escrow pending the hearing). Indeed, petitioner does not argue otherwise. This disposes of any argument that pre-collection notice is required by *procedural due process*; for, if no *hearing* of any kind must be held before collection of dues or fees begins, there is no reason why *notice* must be sent before collection begins. And, any claim that pre-collection notice is required by the *First Amendment* is untenable where, as in *Grunwald*, none of an objector's money is spent until objections have been received and resolved. *See supra* at 8-12.

Accordingly, however the Court may resolve the question of pre-collection notice in this case, *see supra* n.15, the Court should make it clear, contrary to the holding of the Ninth Circuit in *Grunwald*, that pre-collection *notice* is not essential where a pre-collection *escrow* is provided to potential objectors.

III. THE PRINCIPLE THAT PROCEDURES FOR COLLECTION OF BAR DUES OR AGENCY FEES SHOULD BE "CAREFULLY TAILORED" DOES NOT JUSTIFY STRIKING DOWN PROCEDURES THAT DO NOT RESULT IN AN OBJECTOR'S MONEY BEING SPENT ON NONCHARGEABLE ACTIVITIES, NOR DOES IT JUSTIFY SUBJECTING UNIONS OR STATE BARS TO UNNECESSARILY BURDENSOME REQUIREMENTS SUCH AS PETITIONER PROPOSES

As a prelude to his arguments with respect to advance reduction, pre-collection notice, and the other procedures petitioner would have the Court mandate, petitioner asserts that "the rule of first-amendment strict scrutiny" should dictate the procedures for collecting bar dues or agency fees. Pet. Br. at 10.

Petitioner's reference to "strict scrutiny" is misleading. *Hudson* did not apply "strict scrutiny" as such; rather, the Court stated that agency fee collection procedures must be "carefully tailored to minimize the infringement." 475 U.S. at 303.[16] And, this Court's prior decisions make plain that such a requirement of "careful tailoring" does *not* "require elimination of all less restrictive alternatives." *Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 478 (1989); *Ward v. Rock Against Racism*, 491 U.S. at 796-800.

Furthermore, the "tailoring" requirement means simply that the government may not "*burden substantially more speech* than is necessary to further the government's legitimate interest." *Fox*, 492 U.S. at 478 (emphasis added), quoting *Ward*, 491 U.S. at 799. That is to say, collec-

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[16] *See also Abood*, 431 U.S. at 222. Indeed, in his separate opinion in *Abood* Justice Powell objected to the fact that the Court did *not* adopt a requirement of proof "that any [exacted] union dues or fees . . . are *needed* to serve *paramount* government interests." *Id.* at 255 (Powell, J., concurring in the judgment) (emphasis added). As Justice Powell saw it, the opinion for the Court in *Abood* required only that the collection of fees be "'relevant or appropriate' to asserted governmental interests." *Id.* at 254.

tion procedures for bar dues or agency fees must be "carefully tailored" to "minimize the infringement" on *First Amendment rights*, not, as petitioner seems to believe, to minimize the amount of money an individual must pay into escrow pending resolution of an objection.

As we have shown, the First Amendment right at stake in this context is a right not to have one's money spent on ideological activities to which one is opposed. *See supra* at 8-12. The requirement of "careful tailoring" cannot justify tinkering with union or bar association procedures *that do not allow such impermissible spending*. Where, as in *Grunwald*, an escrow system prevents any impermissible spending of an objector's money, advance reduction or pre-collection notice serve no constitutional purpose.

Indeed, even where there is a possibility that some part of an individual's compelled dues or fees *might* be spent on nonchargeable matters, the Court took pains in *Hudson* to make clear that "[a]bsolute precision" is not required in this regard. 475 U.S. at 307 n.18. Thus, the Court required only an "adequate," not an exhaustive, "explanation of the basis for the fee," *id.* at 306, 310; allowed the collection of fees without a pre-deprivation hearing, *see supra* at 20; allowed for the resolution of objections through an arbitration process that does not utilize full evidentiary safeguards, *id.* at 308 n.21; and allowed an escrow of less than 100% of the fee paid by an objector while challenges to the fee are pending, *id.* at 310. *See supra* n.5. In these and other respects, the Court refused to impose requirements which, while they might provide some additional protection of First Amendment interests, would unduly burden a union's effort to collect agency fees. The Court thus heeded its own admonition that "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" *Id.* at 302, quoting *Abood*, 431 U.S. at 237 (emphasis added).

As Judge Posner has observed, employees and interest groups who are politically opposed to unions often bring litigation seeking to establish burdensome restrictions on a union's procedure for collecting agency fees, simply to harm the union. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1313, 1316 (7th Cir.) (Posner, J.) ("the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union," and the remedy they seek is designed "to weaken and if possible destroy [it]"), *cert. denied*, 110 S.Ct. 278 (1989). *Grunwald* is an illustration of this problem. Judge Kozinski put it well:

> [T]he union has come up with a procedure that accommodates the legitimate interests of the minority, while preserving the union's right to collect agency fees without undue administrative costs. Tyranny of the majority this simply is not.
>
> I do see, however, a different kind of tyranny in this case—the tyranny of the modern lawsuit. In a dispute over interests that are, in my judgment, adequately served and in any event minuscule, the plaintiffs have managed to impose on the defendants very substantial litigation costs. Win, lose or draw, the union will have spent a substantial chunk of the funds collected and earmarked for representation. Moreover, the majority's ruling will impose on the union a burden vastly out of proportion to any benefits plaintiffs may gain by getting their $8 a month starting in September rather than December.
>
> We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. [917 F.2d at 1232-33 (dissenting opinion)].

Cases such as *Gilpin* and *Grunwald* illustrate how important it is that in fleshing out the procedures required by *Hudson* the courts limit their intervention to what is necessary for "preventing compulsory subsidization of ideological activity by employees who object thereto," *Hudson*, 475 U.S. at 302, and that in pursuing that end care is taken not to "restrict[] the Union's ability to re-

quire every employee to contribute to the cost of collective-bargaining activities." *Id.*

Judge Kozinski was correct in perceiving that, at least where an individual's compelled contributions are held in escrow pending resolution of any objections, to require in addition an advance reduction and a pre-collection notice would not advance "[any] constitutional right . . . at all," *Grunwald*, 917 F.2d at 1233 n.5 (dissenting opinion), and would obstruct the union's right "to collect from everyone in the unit a pro rata share of the funds it expends on representational activities, and to do so in an orderly and cost-efficient manner," *id.* at 1232.

Nothing in *Hudson* authorizes the courts to impose such requirements on unions or state bars.

CONCLUSION

The Court of Appeals' holding that an advance reduction of dues is not required where an objector's dues are held in escrow pending resolution of an objection should be affirmed. The Court of Appeals' holding that notice need not always precede the initial collection of dues should also be affirmed; or, in the alternative, if that holding is reversed this Court should make clear that pre-collection notice would not be required where, as in *Grunwald*, the money collected from potential objectors is held in escrow until objections have been filed and resolved.

Respectfully submitted,

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